reserved, it is answered that whatever immunities exist (e. g. non-liability for consequential injuries to property) when the right of eminent domain is conferred, flow from the law as it then exists and not from the charter conferring the right; that the charter continues in full force despite changes in the law.[13] Also, it is said that the parties contract subject to subsequent changes in the law.[14] This begs the question for the obligation of a contract is the right which existing law confers, and changes in that law which abridge the right manifestly impair that obligation. A better solution appears to be that, since the right of eminent domain inheres in sovereignty, policy compels an implied reservation by the state of the right to determine at any time on what terms the right of eminent domain shall thereafter be exercised. This enables the state to accord adequate protection to the individual, from a possible oppression by large interests entitled to exercise the right of eminent domain. This view is advocated in a recent New York case, *People ex rel. Lasher* v. *City of N. Y.* (1909) 42 N. Y. L. Jour. No. 5. Such subsequent legislation, however, can be given no retroactive effect for rights acquired under any prior exercise of the power are clearly vested.[15]

Of course, legislation affecting the remedy and not the obligation of a contract is unconstitutional. Accordingly, changes in the mode of assessing the compensation due,[16] or the granting of an appeal from the award of compensation, where none previously existed,[17] or the extension of the period within which such an appeal must be brought,[18] are all unobjectionable. In some cases, the condemnor has, by legislation purporting to affect the remedy only, been deprived of a valid technical defense.[19] This result, however, is questionable.[20]

VOIDABLE PREFERENCES AND THE DOCTRINE OF RELATION BACK.—By the National Bankruptcy Act,[1] a transfer by the bankrupt within four months of the petition may become voidable as a preference. The time of the transfer is, therefore, material in determining its voidability, and the courts differ on the question whether the actual date of the transfer shall govern,[2] or whether the date of the right to demand the transfer shall control.[3] The courts of New York[4] and of Massachusetts[5] advocate the former doctrine, the United States Supreme Court,[6] the latter. *Tatman* v. *Humphrey*[5] which refuses to invoke the doctrine of relation back, adopts the theory that,

[13]M'Elroy *v.* Kansas City (1884) 21 Fed. 257.

[14]Pa. R. R. Co. *v.* Miller (1889) 132 U. S. 75; Drady *v.* Ry. Co. (1881) 57 Ia. 393.

[15]Pearsall *v.* Gt. Northern Ry. Co., *supra;* Bohlman *v.* Green Bay Etc. Co. (1876) 40 Wis. 157; Towle *v.* Eastern R. R. (1847) 18 N. H. 547; City of Chicago *v.* Rumsey (1877) 87 Ill. 348.

[16]Baltimore Etc. R. R. Co. *v.* Nesbit (1850) 10 How. 395.

[17]United Cos. *v.* Weldon (1885) 47 N. J. L. 59.

[18]Gowen *v.* Penobscot R. R. Co. (1857) 44 Me. 140.

[19]Danforth *v.* Groton Water Co. (1901) 178 Mass. 472.

[20]Nichols, The Power of Eminent Domain § 324.

[1]§60 a., b.

[2]Long *v.* Farmer's State Bank (1906) 147 Fed. 361.

[3]Sabin *v.* Camp (1900) 98 Fed. 974.

[4]Matthews *v.* Hardt (1903) 9 Am. B. R. 373, 383.

[5]Tatman *v.* Humphrey (1903) 184 Mass. 361.

[6]Thompson *v.* Fairbanks (1903) 196 U. S. 516.

although, under the State law, the general creditor may be helpless against the prior equities of the preferred-mortgagee creditor, the Bankruptcy Act comes to his rescue, by refusing to allow the latter to perfect his title by taking possession within the four months under an unrecorded chattel mortgage. The *ratio decidendi* of the Supreme Court, however, in overruling this decision[7] seems to have been that the court will leave the parties in *statu quo* under the State law; i. e. that the general creditor in such an instance acquires no greater rights under the Bankruptcy Act than his State has already accorded him. *Thompson* v. *Fairbanks*[6] forecasts this result. This construction, however, may result in nullifying the statute.[8] It is, therefore, necessary to determine the extent of the legal or equitable interest which the creditor must have acquired before the Supreme Court will protect his interest to the prejudice of the general creditors.

Since the federal courts have declared, that a mere anterior contract by the debtor to give a lien, creates no equities in the creditor sufficient to validate a transfer made within the statutory period,[9] and since the same rule is applied to the debtor's precedent contract to pledge the goods,[10] it is submitted that the line of demarcation is where the creditor has at least acquired an equitable title through the anterior agreement.[11] Moreover, the two leading Supreme Court cases on the subject,[12] deal with the mortgagee's rights under an anterior unrecorded chattel mortgage of after-acquired property, and hold that an equitable title vests in the mortgagee the instant that the chattels come into the possession of the mortgagor. The court considers that the mortgagee's rights attach *eo instanti,* and that any further act or acquiescence by the mortgagor within the four months, such as permitting the mortgagee to take possession, is not a transfer of property.

A recent federal case, *Sexton* v. *Kessler* (1909) 41 *Chi. Legal News* No. 44, squarely raises the issue. B, a banking corporation, contracted with A to set aside, and did in fact set aside, before the four months period, in an envelope marked "'escrow' for account of A," securities either endorsed in blank or negotiable by delivery. B, however, retained full power of substitution upon notice to A. B's delivery of possession of the envelope to A fourteen days before petition filed, was held not to constitute a voidable preference. The court in terms adopted the doctrine of *Thompson* v. *Fairbanks,* on the ground that the transaction constituted a mortgage of existent and after-acquired choses in action, and not a mere contract to pledge.

On principle, there seems to be no valid distinction between enforcing the rights of the mortgagee and those of the prospective pledgee, and in both cases damages are an inadequate remedy.[13] The fallacy of the attempted distinction is that it fails to recognize that the primary purpose of the Act is to prevent any inequality among creditors of the same class.[14] The

---

[7]Humphrey *v.* Tatman (1905) 198 U. S. 91.
[8]18 Harv. L. Rev. 606.
[9]Long *v.* Farmer's State Bank, *supra.*
[10]Casey *v.* Cavoroc (1877) 96 U. S. 467.
[11]Fisher *v.* Zollinger (1906) 149 Fed. 54.
[12]Thompson *v.* Fairbanks, *supra;* Humphrey *v.* Tatman, *supra.*
[13]Williston, Transfers of After-Acquired Property, 19 Harv. L. Rev. 557, 583.
[14]Pirie *v.* Chic. Title & Trust Co. (1900) 182 U. S. 438, 449.

New York and Massachusetts courts simply extended to voidable preferences the test previously defined by the Supreme Court in respect to acts of bankruptcy[15]—that the act or attitude at which the statute was aimed was that which first gave notice to the general creditor that a specific creditor was attempting to place his claim in a preferred position.[16] Since such an interpretation conduces much more to an equal distribution of the bankrupt's assets, the New York and Massachusetts doctrine would seem preferable.

INVALID GIFTS AND PAROL TRUSTS.—Prior to the Statute of Uses a settlor could create an enforceable Use in a volunteer provided title was conveyed to a third person. And a Use *in esse* could be gratuitously granted. In the absence of transmutation of possession, however, the designated beneficiary could gain recognition in Equity only upon showing a consideration of blood or money. This distinction was subsequently disregarded in the law of Trusts by a decision[1] to the effect that the owner of property could constitute himself a trustee for another by manifesting a clear intent to hold a specific *res* in trust. Nor was a consideration required. This result was anomalous. However, it was at once seized upon as a means of perfecting in Equity a gift invalid at law.[2] Two cases arise: (1) a gift from A to B, in trust for C; (2) a gift from A to B. Obviously, C's rights in Equity in the first case depend upon the validity of B's legal title. It is elementary that lack of delivery, or disability in the donee, as in the case of a wife upon a donation from her husband, invalidates a gift at law. Accordingly, the question of B's title is easy of determination if chattels are involved, but as to choses in action the question is more difficult since no title passes by the assignment. However, the donee and the *cestui* are protected if the donor has left undone no act that Equity cannot compel.[3] Thus an assignment of a chose in action coupled with a power of attorney, express or implied, sufficiently vests title in the donee.[4] As the donor's death revokes his power of attorney unless it be coupled with an interest, the right of the donee, or the *cestui*, subsequent to the donor's death is not free from doubt.

Although few courts have refused to consider such a gift valid if made *causa mortis*,[5] greater reluctance is felt concerning gifts *inter vivos*.[6] It has been urged that title to the paper evidencing the chose in action is a sufficient interest to render irrevocable the accompanying express or implied power of attorney.[6] Some jurisdictions, moreover, regard this

---

[15]Wilson *v.* Nelson (1901) 183 U. S. 191.

[16]Cf. Security Warehousing Co. *v.* Hand (1906) 206 U. S. 415, 422.

[1]*Ex Parte* Pye (1811) 12 Ves. 140; Gerrish *et al. v.* New Bedford Institute (1879) 128 Mass. 159; Westlake *et al. v.* Wheat (N. Y. 1887) 43 Hun 77.

[2]Morgan *v.* Malleson (1870) L. R. 10 Eq. 475; Richardson *v.* Richardson (1867) L. R. 3 Eq. 686.

[3]Colman *v.* Sarrel (1789) 1 Ves. Jr. 50; Stone *v.* Hackett (Mass. 1858) 12 Gray 227; Otis *v.* Beckwith (1868) 49 Ill. 121.

[4]Fortescue *v.* Barnett (1834) 3 Myl. & K. 36; Hackney *v.* Vrooman (N. Y. 1862) 62 Barb. 650; Wing *v.* Merchant (1869) 57 Me. 383; Syle *v.* Burke (1879) 40 Mich. 499.

[5]1 COLUMBIA LAW REVIEW 488.

[6]1 Harv. L. Rev. 41.